82-375

No.

Office - Supreme Court, U.S.
FILED
AUG 19 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

LOUIS N. RITTEN & CO.,
Petitioner,

v.

THE COMMISSIONER OF REVENUE,
STATE OF MINNESOTA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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QUESTIONS PRESENTED

I.

WHETHER MINNESOTA'S INCOME TAX ON INTEREST INCOME FROM U.S. GOVERNMENT OBLIGATIONS VIOLATES 31 U.S.C. 742 AND, THEREFORE, THE SUPREMACY AND BORROWING CLAUSES OF THE FEDERAL CONSTITUTION.

II.

WHETHER PETITIONER, A COMMODITIES FUTURES BROKER, WAS ENGAGED EXCLUSIVELY IN INTERSTATE COMMERCE AS DEFINED BY THIS COURT IN OZARK PIPE LINE v. MONIER, 266 U.S. 555, 45 S.Ct. 184, 69 L.Ed. 439 (1925) AS ITS LOCALIZED ACTIVITIES CONSTITUTED THE MEANS AND INSTRUMENTS BY WHICH IT CONDUCTED ITS INTERSTATE BUSINESS.

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PRAYER

The Petitioner, LOUIS N. RITTEN & CO., respectfully prays that a Writ of Certiorari issue to review the Judgment and Order entered by the Minnesota Supreme Court on May 21, 1982.

OPINION BELOW

The Opinion of the Minnesota Supreme Court, May 21, 1982, reported at 319 N.W.2d 421-424, is attached hereto and appears as Appendix A. No rehearing was sought.

STATE OF JURISDICTION

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. 1257(3), and this Petition for a Writ of Certiorari has been filed within the time permitted by law, within 90 days of the decision of the Minnesota Supreme Court on May 21, 1982.

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, section 8, clauses 2 and 3, of the United States Constitution provides "Congress shall have the Power";

"To borrow Money on the credit of the United States."

"To regulate Commerce with foreign nations, and among the several States and with Indian Tribes."

Article VI, clause 2 provides:

"This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land."

STATUTORY PROVISION INVOLVED

Title 31, Section 742, United States Code, states:

> Except as otherwise provided by law, all stocks, bonds, Treasury notes, and other obligations of the United States, shall be exempt from taxation by or under State or municipal or local authority. This exemption extends to every form of taxation that would require that either the obligations or the interest thereon, or both, be considered, directly or indirectly, in the computation of the tax, except nondiscriminatory

franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes.

STATEMENT OF THE CASE

Petitioner sought a refund for $15,958.26 Minnesota income taxes paid on interest income from United States obligations on the ground it was exclusively engaged in interstate commerce within the meaning of the United States Constitution. The Court rejected Petitioner's commerce clause argument and held the Petitioner was not entitled to the refund because (1) inclusion of interest on United States obligations does not violate 31 U.S.C. §742 because the Minnesota income tax is a "nondiscriminatory franchise or other nonproperty tax

in lieu thereof" (319 N.W. 2d 421, 422-423, N.1.), and, (2) Petitioner was not engaged in exclusively interstate commerce since its "local" interstate activities were not "ancillary" to its interstate activity but at the "heart of" its business.

The commerce clause issue was raised by Petitioner in the Minnesota Supreme Court. The claimed conflict between 31 U.S.C. §742 and the Minnesota tax was an issue decided by the Minnesota Supreme Court in footnote 1 of its opinion, supra.

REASON FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND THE FEDERAL QUESTION IS SUBSTANTIAL.

This term the Court granted review in three other cases involving 31 U.S.C. §742: (1) No. 81-1613, Memphis Bank & Trust Co. v. Garner; (2) No. 81-1717, American Bank and Trust Co. v. Dallas County, and (3) No. 81-1834, Bartow County Bank v. Bartow County Board of Trustees. These cases concern state tax laws claimed to violate Federal law (31 U.S.C. §742) and the Federal Constitution as indirect taxation of Federal debt obligations. This case concerns a direct tax laid upon "interest income from United States government obligations." (319 N.W.2d 421 at 422) And, the tax is discriminatory as it applies only to corporations not "engaged exclusively in interstate commerce."

At least since McCulloch v. Maryland, 17 U.S. 316, 4 Wheat. 316, 4 L.Ed. 579 (1819), this Court has never doubted that debt obligations of the Federal government are immune from state taxation. At various times the Court has attributed this exemption to policies underlying the borrowing clause and the supremacy clause. This Court said, in Home Savings Bank v. DesMoines (1906) 205 U.S. 503, 513, 51 L.Ed. 901, 27 S.Ct. 571:

> The State cannot by any form of taxation impose any burden upon any part of the national public debt. The Constitution has conferred upon the Government power to borrow money on the credit of the United States, and that power cannot be burdened or impeded or in any way affected by the action of any State. This principle was announced in Weston v. Charleston, 2 Pet. 449, where it was held that taxes upon the stock of the United States levied by one of the municipal corporations of South Carolina were

> invalid. From that time no one has questioned the immunity of national securities from state taxation. It may well be doubted whether Congress has the power to confer upon the States the right to tax obligations of the United States. However, this may be, Congress has never yet attempted to confer such a right. Until the time of the Civil War it was not thought to be necessary to express the constitutional prohibition in an act of Congress. But on the occasion of authorizing the issue of Treasury notes it was enacted that "all stocks, bonds, and other securities of the United States held by individuals, corporations, or associations within the United States shall be exempt from taxation by or under state authority." Act of February 25, 1862, 12 Stat. at Large, 346.

See, also, Northwestern Mutual Life Insurance Co. v. State of Wisconsin, 274 U.S. 136, 140-141, 72 L.Ed. 202, 48 S.Ct. 55 (1927) (tax by state on interest income from U.S. bonds), Weston v. City Council of Charleston, 27 U.S. 449, 467,

2 Pet. 449, 7 L.Ed. 481 (1829) (state tax on interest income from United States stock).

When this Court, beginning in the mid-1930's began to sweep away the traditional view that under the Commerce Clause interstate commerce could not be taxed at all, and that the Commerce Clause created an area of trade free of State taxation, it did not leave commerce wholly unprotected from the undue burdens of State taxation. Since the 1930's the fiscal position of some state treasuries has become precarious and Minnesota is one such state. But, at least in the absence of Congressional authorization, the States are still not free to tax commerce at will.

Minnesota has interpreted language in some of this Court's opinions so broadly that no restrictions at all remain on the power of the States to tax commerce. In (1) defining its business as "local" and, (2) expressly approving a state income tax on United States interest obligations despite 31 U.S.C. §742, the Minnesota Court has misconstrued this Court's opinion. The taxation of income from Federal obligations is of major fiscal importance to businesses such as that of Petitioner, to the Federal government and to the States.

CONCLUSION

For the reasons stated, the Petitioner respectfully prays that this

Honorable Court issue a Writ of Certiorari to review the judgment of the Minnesota Supreme Court.

Respectfully submitted,

Michael J. McArdle

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APPENDIX A

Opinion of the Minnesota Supreme Court dated May 21, 1982, reported at 319 N.W.2d 421.

Heard, considered and decided by the court en banc.

PETERSON, Justice.

The sole issue for decision is whether Louis N. Ritten & Company, Inc. is engaged exclusively in interstate commerce, the determination of which dictates whether relator is taxable pursuant to Minn. Stat. § 290.02 (1971), the excise tax on corporations, or Minn. Stat. § 290.03(1) (1971), the income tax on corporations.

Relator filed returns in 1972, 1973 and 1974 under the assumption that it was subject to the state excise tax on corporations, Minn. Stat. § 290.02 (1971), which is based on corporate income. A deduction for interest income from United States government obligations, granted pursuant to Minn. Stat. § 290.08, subd. 8 (1971), is denied to section 290.02 taxpayers by

virtue of Minn. Stat. 290.08, subd. 13 (1971). Relator filed timely claims for refund of taxes paid on interest income for the years stated on the ground that it was engaged exclusively in interstate commerce and therefore should have filed returns pursuant to Minn. Stat. § 290.03 (1) (1971), the net income tax on corporations. Under the net income tax on corporations, relator's interest income from United States government obligations would have been deductible and its tax liability would have been reduced by $15,958.26.

The Commissioner of Revenue disallowed relator's claim for refund in an order dated October 2, 1979. The disallowance was affirmed by the Minnesota Tax Court after a short evidentiary hearing, and relator now appeals by writ of certiorari.

Relator was incorporated under the laws of this state in the 1920's as a commodities futures broker. Until the 1960's, relator's only office was in Minneapolis; a second office is now maintained in Chicago. During the relevant tax years, relator employed six or seven individuals-brokers, corporate officers and support staff-at the Minneapolis office.

Relator's futures trading involves the buying and selling of standardized contracts that specify a date and price at which a commodity will be delivered. The trading takes place on the floor of an exchange, a competitive marketplace governed by rules promulgated by Congress and the federal Commodity Futures Trading Commission. A customer can have an order executed on the exchange floor by one of relator's brokers by first entering into a cash or credit transaction with relator.

The credit transactions, or trades "on margin," involve depositing a downpayment with the broker, who uses the value of the futures contract as collateral for the unpaid balance. The unpaid balance or a portion thereof is subject to call by the broker in the event the commodity on the national market falls below a specified price.

[1] Section 290.03(1)[1] imposes a net income tax on a class of taxpayers

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1. The segregation of corporations engaged exclusively in foreign or interstate commerce for different tax treatment has its historical roots in now-discarded interpretations of the Commerce Clause. When the state

income tax scheme was created in 1933, federal courts construed the Commerce Clause as prohibiting all state excise or franchise taxes on the privilege of doing business if the taxed businesses were engaged exclusively in interstate commerce. Alpha Portland Cement Co. v. Mass., 268 U.S. 203, 45 S.Ct. 477, 69 L.Ed. 916 (1925). State legislative draftsmen thereafter discovered that by avoiding the magic words "franchise" or "privilege"they could constitutionally tax these interstate businesses. See Northwestern States Portland Cement Co. v. Minn., 358 U.S., 450, 79 S.Ct. 357, 3 L.Ed.2d 421 (1959), aff'g 250 Minn. 32, 84 N.W.2d 373 (1957) (upholding Minn.Stat. § 290.03 as tax on income derived from interstate commerce, not on the privilege of engaging in interstate commerce).

In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S.Ct. 1076, 51 L.Ed2d 326 (1977), the United States Supreme Court discarded this formalistic rule, with its emphasis on statutory wording, in favor of a rule turning on the tax statute's effect on interstate commerce. The Complete Auto Transit rule permits a tax on exclusively interstate business if the business has a substantial nexus with the taxing state and the tax is fairly apportioned, does not discriminate against interstate commerce and is fairly related to the services provided by the state. Id. at 279,97 S.Ct. at 1079..

The inclusion of interest on United States government obligations in computing the franchise tax, but not the

Income tax, is the product of federal legislation which prohibits taxation of such interest except under "non-discriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." 31 U.S.C. § 742 (1976); see Reuben L. Anderson-Cherne, Inc. v. Comm'r of Taxation, 303 Minn. 124, 226 N.W.2d 611, appeal dismissed, 423 U.S. 886, 96 S.Ct. 181, 46 L.Ed.2d 118 (1975).

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defined as follows: "Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists

exclusively of foreign commerce, interstate commerce, or both[.]" In determining whether relator falls within this class of taxpayers, we are bound by decisions of the United States Supreme Court relating to what constitutes interstate commerce. City of Waseca v. Braun, 206 Minn. 154, 165, 288 N.W. 229, 234 (1939). The fact that a business activity involves interstate commerce to a degree sufficient to permit federal regulation does not, however, justify an automatic conclusion that the activity is exclusively interstate. Our inquiry does not end with the fact that commodity futures transactions are in interstate commerce according to federal law.

Relator cites several cases in which a taxpayer has been characterized as

engaged exclusively in interstate commerce. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 79 S.Ct. 357, 3 L. Ed 2d 421 (1959), aff'g 250 Minn. 32, 84 N.W.2d 373 (1957); West Publishing Co. v. McColgan, 27 Cal.2d 705, 166 P. 2d 861, aff'd 328 U.S. 823, 66 S.Ct. 1378, 90 L.Ed. 1603 (1946); Owens-Illinois Glass Co. v. Commissioner of Taxation, No. 196 (Minn.Bd. Tax App., September 24, 1946). In none of those cases, however, was the characterization of the taxpayer's business activities as "exclusively interstate" actually placed in issue. More significantly, those business activities were markedly different from the activities of relator.

In each of the cited cases, the only commercial activity by the taxpayer in the taxing state was that of the sales arm of a manufacturing, shipment and sales operation headquartered in another state. Salespersons employed by each taxpayer engaged in commercial activity that had economic significance only as it related to the interstate sale and shipment of a product originating outside of the taxing state.

If relator was engaged exclusively in the business of selling grain and commodities grown outside of Minnesota to customers within Minnesota, then, perhaps the cited cases would be apposite. However, relator sells a service separate and removed from the interstate shipment of grain. The services of brokers have, in other contexts, been recognized as a

distinct and localized commercial activity. In Union Brokerage Co. v. Jensen, 215 Minn. 207, 9 N.W.2d 721 (1943), aff'd 322 U.S. 202, 64 S.Ct. 967, 88 L.Ed. 1227 (1944), the activities of a customhouse broker were found to be intrastate in character even though his services were entirely devoted to facilitating the movement of goods in foreign commerce.

> The broker acts as an independent contractor to perform this personal service for the shipper. He does not come into contact with the commerce itself in any way insofar as its actual movement is concerned. He is at the most an aid or facility to the commerce and but remotely, if at all, affects it.

Id. at 221, 9 N.W.2d at 728.

[2] The commodities futures broker bears a similar relationship to trade in commodities. As a representative of private persons, the broker provides access to the futures exchange, thus facilitating the flow of commodities in commerce without coming into contact with the commerce itself. This service is provided pursuant to a contractual agreement entered into when a customer walks into a broker's office. The agreement includes a commission charged for the service provided and, if the customer is trading on margin, it also establishes a credit arrangement at an agreed upon interest rate. In view of these localized activities, we cannot characterize relator's business within this state as consisting exclusively of interstate commerce.

The distinction drawn in Union Brokerage between intrastate brokerage services and the commerce it facilitates is not without support. A state license tax on a cotton futures broker was held valid in Ware & Leland v. Mobile County, 209 U.S. 405, 28 S.Ct. 526, 52 L.Ed. 855 (1908). The court noted with respect to those futures transactions that were merely speculative and followed by no actual delivery that it could not be fairly contended that such contracts were the subject of interstate commerce. Id. at 412-13, 28 S.Ct. at 528-529. The contracts a fortiori cannot be the subject of exclusively interstate commerce. Cf. Gaines, Silvey & Nichols, Inc. v. State Board of Tax Appeals, 122 N.J.L. 334, 336, 5 A2d 473, 474 (1939) (insurance broker "was not in the business of selling insurance

in the strict sense because it did not have insurance to sell. It sold a service to a customer, nothing more.").

Even if found to be engaged in localized activities, relator contends that these activities do not prejudice its position on appeal because they are ancillary to relator's interstate business. The only case cited by relator which reasonably supports this theory is Ozark Pipe Line Corp. v. Monier, 266 U.S. 555, 45 S.Ct. 184, 69 L.Ed.439 (1925), which is distinguishable on its unique facts. Ozark Pipe Line Corp., a Maryland corporation with its principal office in Missouri, operated a petroleum pipeline from Oaklahoma through Missouri to a point in Illinois. The oil gathering lines were all in Oklahoma and no

oil was received or delivered in Missouri. Despite the exercise of corporate powers in Missouri, and the employment of labor, ownership of property and purchase of supplies there, Ozark Pipe Line Corp. was held to be exclusively engaged in interstate commerce because all of its localized activities were in furtherance of interstate commerce. The localized activities constituted the "means and instruments" by which interstate commerce is conducted. The unique feature of Ozark Pipe Line is that the commercial activity-transporting oil from Oklahoma to Illinois-necessarily involved interstate commerce, and none of its activities had an economic effect other than to aid the operation of the

pipeline. In the present case, relator's intrastate activities are not ancillary to interstate commerce; they are at the very heart of relator's business.

Affirmed.

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SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

MICHAEL J. MC ARDLE
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A. Opinion of the State of Minnesota Tax Court, dated April 22, 1981

APPENDIX A

Opinion of the State of MINNESOTA TAX COURT dated April 22, 1981

STATE OF MINNESOTA

TAX COURT

Louis N. Ritten & Co., Inc.,	In the Matter of an Appeal from the Commissioner's Order dated October 2, 1979 Relating to corporation income tax liability for the taxable years 1972, 1973 and 1974.
Appellant,	
vs.	
The Commissioner of Revenue,	
Appellee.	Docket No. 3009
	Order Dated April 22, 1981.

The above entitled matter came on for hearing before the Honorable John Knapp, Judge of the Tax Court of the State of Minnesota, at 444 Lafayette Road, St. Paul, Minnesota, on May 14, 1980, beginning at approximately 10:00 a.m. With consent of respondent and permission from the Court, Henry M. Grannan, Esq., 20 N. Wacker, Chicago, Illinois, appeared for Appellant and Paul R. Kempainen, Special Assistant Attorney

General, appeared for Appellee.

This is an appeal from the order of the Commissioner of Revenue dated October 2, 1979, denying a claim for refund of excise taxes paid by the Appellant on interest from the United States government obligations for calendar years 1972, 1973 and 1974. The claims for refunds are in the amount of $15,958.26.

ISSUE

The issue is whether or not the business of the Appellant "consists exclusively of foreign commerce, inter-state commerce, or both" within the meaning of Minn. Statute § 290.03. Under that statute interest earned on investments in obligations of the United States are exempt from Minnesota income tax.

DECISION

The Appellant is not engaged

"exclusively" in inter-state commerce and is properly taxed under Minn. Statute § 290.02.

From the testimony adduced at the trial and from the files and records herein, the Court now makes the following:

FINDINGS OF FACT

1. The Appellant is a Minnesota corporation engaged primarily in the business of trading commodity futures, and investing the income therefrom. It is duly registered as a futures commission merchant with the U. S. Commodity Futures Trading Commission. The tax years at issue herein are 1972, 1973 and 1974.

2. The Appellant was incorporated under the laws of Minnesota in 1928. Until sometime in the 1960's, Appellant's sole offices were located

within the State of Minnesota, but in the 1960's offices were also opened up in Chicago. During each of the tax years in issue, the Appellant filed its state and federal income tax returns from its Minnesota office address at 109 Grain Exchange Building, Minneapolis, Minnesota.

3. At its Minneapolis office the Appellant employs six or seven employees; which includes the firm's Minneapolis brokers, three of the firm's officers (one of whom is also a broker), and a support staff. All of the Appellant's employees are licensed by the Commodity Futures Trading Commission and are governed thereby.

4. The mechanics of futures trading is outlined in an excerpt from the committee's report on H. R. 13113, which is appended to the committee print of the Commodity Futures Trading Commission Act

of 1974 on page 128 and 129. It reads as follows:

The Mechanics of Futures Trading

Placing Orders

The customer contacts a solicitor or account executive who in turn transmits the order, either directly or through a central office, to the exchange trading floor. The order is received on the trading floor by the firm's phone man. After recording and time-stamping the order, he gives it to a runner who carries the order to a floor broker in the designated trading area for that commodity. These trading areas are called pits or rings and each delivery month of a commodity is generally traded in a certain area of the pit or ring. Some firms no longer telephone orders to the floor. Instead, the orders are fed through a computerized system that transmits them to the floor via teletype.

Execution of Trades

The actual trading of futures contracts takes place in the noisy, boisterous setting of an auction-type market. The Commodity Exchange Act requires that all futures transactions in regulated commodities be executed on a commodity exchange designated by the Secretary of Agriculture as a "contract market."

Both the Commodity Exchange Act and the rules and regulations of the commodity exchanges require that futures transactions be executed openly in a competitive manner. Section 1.38 of the regulations under the Commodity Exchange Act reads as follows: "All purchases and sales of any commodity for future delivery on or subject to the rules of a contract market shall be executed openly and competitively by open outcry or posting of bids and offers or by other equally open and competitive methods, in the trading pit or ring or similar place provided by the contract market, during the regular hours prescribed by the contract market for the trading in such commodity." Certain carefully prescribed exceptions to competitive trading are allowed, but they do not nullify the general requirement of open and competitive trading.

The purpose of this requirement is to ensure that all trades are executed at competitive prices and that all trades are focused into the centralized marketplace to participate in the competitive determination of the price of futures contracts. This system also provides ready access to the market for all orders and results in a continuous flow of price information to the public.

The rules requiring competitive trading also require that all trades be executed in the area and during the hours designated by the contract market. Other exchanges can trade virtually identical contracts for the same commodity, provided they meet the requirements of a contract market as specified by the Commodity Exchange Act and are so designated by the Secretary of Agriculture.

Clearing Trades

After a trade has been executed, the confirmation of the trade retraces the path of the initial order within a few minutes. Final confirmation, however, cannot be made until the trade goes through the clearinghouse. In the clearinghouse, both sides of the trade must be matched, and any differences between the buyer and seller must be referred to the clearing firms involved for reconciliation.

A brief description of the clearing procedure for futures trading points out one of the major distinctions between futures and securities trading. Unlike securities, there is no certificate or document exchanged in a futures transaction. The futures contract is embodied in the rules and regulations of the contract market.

The clearinghouse (or clearing association) performs the functions of matching all buys and sells which are executed each day and of assuring the financial integrity of all futures transactions. As trades are matched and confirmed at the end of each trading session, the clearinghouse takes the opposite side of every transaction. It becomes the seller of all "buys" and the buyer of all "sells." Thus, when a trader establishes a position in the market, he does so with the clearinghouse, and when he offsets his position he offsets it with the clearinghouse. The clearinghouse assumes the legal responsibility for the opposite side of every transaction made on the contract market.

The clearinghouse requires that its members deposit margins to secure their firm's futures transactions. The clearing members, in turn, require margins from their customers. If the market moves against the open contracts of a clearing firm, that firm's initial margin is impaired and additional margin will be required.

Daily payments or receipts also occur between the clearinghouse and its members to account for daily price changes. The clearinghouse maintains the open accounts of member firms at the current market prices. At the

end of each day, these accounts are adjusted to the day's settlement price for each contract. Firms with net gains receive payment from the clearinghouse, while firms with net losses make payments to the clearinghouse. These receipts and payments of the clearinghouse exactly offset one another, with the clearinghouse merely transferring equity from losers to winners.

5. Pursuant to rules of the Commodity Futures Trading Commission, the Appellant is required, as a part of its business activities, to invest some of its customers' funds in federal government bonds and notes. This is not "another" business activity, but only an ancillary activity of its business. If the Appellant did not purchase the required securities, it would be in violation of the Commodity Futures Trading Act.

6. During the taxable year 1974 the Appellant maintained a savings account in its own name and using its own excess

funds at the Midland National Bank of Minneapolis, Minnesota. During 1974 this account earned interest for the Appellant in the amount of $63,243.00. Throughout the years in issue the Appellant also maintained other banking connections with the Midland National Bank of Minneapolis.

7. During each of the years in issue the Appellant invested segregated customer funds in its possession, which had been put up as margins to cover trades, in U.S. Treasury bills and bonds. The income realized from these transactions was duly reported by the Appellant on its income tax returns in the following amounts:

1972	$ 24,239.87
1973	$182,660.00
1974	$282,463.00

These U. S. Treasury bills and bonds were purchased by the Appellant through the Midland National Bank of Minneapolis as well

as through a Chicago bank. Those U. S. securities bought in Minnesota were kept in safe keeping at the Midland National Bank; and when they were eventually sold or turned in by the Appellant this was also done at the Midland National Bank in Minneapolis.

8. As mandated by regulations controlling the business activities of commodity brokers, the Appellant also invested in other marketable securities which were shown as assets on its balance sheets for each of the years in question, as follows:

Balance Sheet as of	Cost Value
12-31-72	$94,325.00
12-31-73	$76,725.00
12-31-74	$84,925.00

9. During each of the years in issue the Appellant also was required to own shares or memberships in the Minneapolis Grain Exchange Clearing Corporation, which were

treated as capital assets. As a result of this ownership, the Appellant received dividends from the Minneapolis Grain Exchange Clearing Corporation in the following amounts:

Year	Dividends
1972	$ 500.00
1973	$3,500.00
1974	$3,000.00

10. The Appellant originally filed its Minnesota Corporate Income Tax returns for each of the years in question on the basis that it was subject to the excise tax on corporations imposed by Minnesota Statutes § 290.02. On these returns, the Appellant included the interest income from its investments from U. S. securities.

11. On or about March 17, 1976, the Appellant filed claims for refund alleging that during the years in question it should have been subject to the net income tax on

corporations imposed by Minnesota Statute § 290.03, and that accordingly its interest income from U. S. securities was exempt from Minnesota taxation pursuant to Minnesota Statute § 290.08, subd. 8.

12. After administrative audit and review by the Department of Revenue, including a conference with Appellant's representative, the Commissioner issued his Order dated October 2, 1979, disallowing the claims for refund for each of the years in question. By his Order the Commissioner determined that the Appellant was a corporation "taxable under Section 290.02" and therefore not eligible to claim the exemptions set forth in subd. 8 of Minnesota Statute § 290.08.

CONCLUSIONS OF LAW

1. The Appellant is a domestic corporation subject to the normal excise tax imposed upon such corporations by Minn.

Statute § 290.02.

2. Appellant is not subject to taxation under Minn. Statute § 290.03, because its business within this state does not "consist exclusively of foreign commerce, inter-state commerce, or both."

3. As a corporation taxable under Minn. Statute § 290.02, Appellant's interest income from United States securities is subject to taxation by Minnesota pursuant to Minn. Statute § 290.08, subd. 13.

4. The Commissioner's Order herein dated October 2, 1979, is correct and proper and should be affirmed in all respects.

ORDER FOR JUDGMENT

The Order of the Commissioner of Revenue is hereby affirmed.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 15 DAYS IS HEREBY ORDERED.

MINNESOTA TAX COURT

John Knapp

John Knapp, Chief Judge

Dated: April 22, 1981.

EARL B. GUSTAFSON, Court Administrator of the Tax Court, State of Minnesota, does hereby certify that the attached instrument is a true and correct copy of the original on file and of record in my office.
Dated this 22nd day of April 1981
Barbara Skinner Deputy Clerk
Docket No. 3669

MEMORANDUM

Appellant acknowledges that it has a tax liability to the State of Minnesota. What is at issue in this case is: Under what section of Minnesota Statutes is the tax obligation computed? When Appellant originally filed its Minnesota tax return, it had computed its tax liability under § 290.02. This section imposes an excise tax on corporations. Upon review of the Minnesota tax law and regulations and applicable federal law, the Appellant decided that it should have been computing its Minnesota tax obligation under § 290.03 of the Minnesota Income Tax Act. Minnesota Statute § 290.03 is similar to § 290.02 except that it imposes an income tax instead of an excise tax, and under § 290.03 interest income from United States obligations is not taxed. Minnesota Statute § 290.03

applies to domestic corporations "which own property within the State or whose business in this State . . . consists exclusively of foreign commerce, inter-state commerce or both." Appellant contends that it complies with that statute.

The question is whether the Commissioner was correct in determining that the Appellant was taxable under Minn. Statute § 290.02. That statute read as follows for the taxable years at issue herein:

> 290.02 EXCISE TAX ON CORPORATIONS; IMPOSITION, MEASUREMENT. An annual excise tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.
>
> The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax

> is imposed, and computed in the manner and at the rates provided in this chapter. (Emphasis added.)

The Appellant clearly meets all the requirements for taxation under this statute. It is indisputably a domestic corporation which not only exists under the laws of Minnesota, but actively exercised its privilege of existence through the conduct of its brokerage business in this state during the taxable years in issue.

Appellant maintained its Minnesota offices at 109 Grain Exchange Building in Minneapolis, where it employed six or seven people, including brokers, three of the firms officers (one of whom is also a broker), and support staff.

During the years in question, Appellant also maintained a bank account for the investment of its excess funds at the Midland National Bank of Minneapolis,

Minnesota. Furthermore, Appellant bought and sold some of its United States securities entirely within Minnesota through the Midland National Bank, where the securities were also held for safekeeping.

Finally, but not unimportantly, it is quite obvious that Appellant's business at its Minneapolis office consists in large part of the receipt and acceptance of orders from Minnesota customers to buy or sell futures. These transactions do not take place on any exchange floor, but rather in or through the privacy of Appellant's Minneapolis office. These transactions are solely between Appellant and its own customers. As such, they take place totally within the State of Minnesota.

These facts clearly establish that Appellant is subject to the normal excise tax on domestic corporations imposed by Minn. Statute § 290.02. Therefore, its

interest income from United States securities is not tax exempt. The facts and the law in this case clearly show that Appellant's business operations do not come within the meaning of that statute's language requiring its business within Minnesota to consist "exclusively" of foreign or inter-state commerce.

Minn. Statute § 290.03, reads in relevant part as follows:

> 290.03 INCOME TAX; IMPOSITION, CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> (1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;
>
> Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or

> through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party; (Emphasis added.)

There is no Minnesota case law on the meaning of the phrase "consists exclusively of foreign commerce, interstate commerce, or both" as used in this statute. However, the applicable Income Tax Regulations do set forth helpful guidelines as to the application of Minn. Statute § 290.03, especially as it relates to the normal excise tax on corporations imposed by Minn. Statute § 290.02. Regulation 2002 reads in relevant part as follows:

> The tax imposed by M.S.A. 290.02 is an excise or privilege tax measured for any given taxable year by the corporation's taxable net income for such year. The tax in the case of a domestic corporation is for the privilege of existing as a corporation during any part of a taxable year. . . . A domestic corporation is taxable under the provisions of M.S.A. 290.03 if its business within this State consists exclusively of interstate or foreign commerce or of both. Any corporation, foreign or

> domestic, whose business is partly interstate or foreign is subject to the excise tax, even though the predominant part of its business is not local. (Emphasis added.)

This regulation, duly promulgated many years ago pursuant to Minn. Statute §§ 290.52, makes it clear that if any part of a domestic corporation's business is local, it is subject to the excise tax imposed by § 290.02, rather than the net income tax imposed by § 290.03. In other words, even if it were assumed arguendo that a predominant part of a domestic corporation's business was interstate, this would still not meet the statutory requirement of "exclusively" interstate commerce.

In the case at hand, there is strong authority for the proposition that a corporation engaged in a business such as Appellant's, is in fact engaging in intrastate business, even though its business may also be considered to affect inter-

state commerce enough to give Congress the authority to regulate it under the Commerce Clause.

Federal regulation does not preclude state taxation and state taxation does not preclude federal regulation. Polish National Alliance vs. N.L.R.B., 322 U.S. 643, 649, 64S.CT. 1196, 1199.

In another case, both the Minnesota Supreme Court and the United States Supreme Court held that the business of a customhouse broker, licensed and regulated by the federal government for the purpose of easing the flow of foreign commerce across the Minnesota-Canadian border, was nevertheless sufficiently localized in nature to subject it to the provisions of Minnesota's Foreign Corporation Act. Union Brokerage Co. v. Jensen, 215 Minn. 207, 9 N.W. 2d 721 (1943); aff'd in 322 U.S. 202, 64 S. Ct. 967 (1944). In the U. S. Supreme

Court's opinion, 322 U.S. at 210, 64 S. Ct. at 972-973, it was said:

> But, as we have noted, while the business of Union is that of a custom-house broker, its activities are not confined to its services at the port of entry. It has localized its business, and to function effectively it must have a wide variety of dealings with the people in the community. The same considerations that justify the particular regulatory measure alone before us, namely the requirement of a certificate of authority in the case of foreign corporations carrying on business other than custom-house brokerage, apply to the carrying on of Union's business in Minnesota. The burden, such as it is, falls on foreign businesses that commingle with Minnesota people. (Emphasis added.)

The same can be said of Appellant in the case at hand. Despite the fact that it is regulated by the federal government, Appellant has also localized its business through a wide variety of dealings with the people of Minnesota. These include its receipt and acceptance of customer orders at its Minneapolis office. They also include its

maintenance of a bank account and other banking connections here, and mainly its maintenance of an office here in which three of the corporate officers are headquartered. All of these facts, together with its purchase and sale of U. S. securities entirely through a Minnesota bank with no part of the transactions being conducted over interstate lines, make it clear that at least a part of Appellant's business has been localized in Minnesota. Thus, its business within Minnesota does not consist "exclusively" of interstate commerce.

Appellant's citation of City of Waseca v. Braun, 206 Minn. 154, 288 N.W. 229 (1939), and several federal cases defining interstate commerce, are irrelevant. No one has denied that Appellant's business does in some measure affect interstate commerce. But this is not the test. Unless Appellant can show that it has no local business

whatsoever in Minnesota, and that its business within this state is "exclusively" interstate, then it is subject to the normal excise tax on domestic corporations imposed by Minn. Statute § 290.02.

Appellant's strong reliance upon the extensive federal regulation of the commodities futures business is likewise irrelevant. It is axiomatic that mere regulation of a business by the federal government under the Commerce Power, however pervasive, has little or no bearing upon the question of state taxation of that business. Braniff Airways v. Nebraska State Board of Equalization and Assessment, 347 U.S. 590, 594-597, 74 S. Ct. 757, 760-762 (1954).

This rule was highlighted in the case of Katzenbach v. McClung, 379 U.S. 294, 85 S. Ct. 377 (1964), where the U. S. Supreme

Court, in upholding the regulatory power of Congress to enact the Civil Rights Act of 1964, rejected as inapposite the citation of Commerce Clause cases dealing with state taxation. In 379 U.S. at p. 302, the Court said:

> Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation.

It is quite obvious that the definition of interstate commerce found in the Commodity Exchange Act, 7 U.S.C. § 2, is not controlling in the instant case simply because it does not define what is "exclusive" interstate commerce for purposes of state taxation. In any event, the legislative history of the Commodity Futures Trading Commission Act of 1974 reiterates the fundamental purpose of the regulatory acts:

> " . . . insuring fair practice and honest dealing on the commodity exchanges and providing a measure of control over those forms of speculative activity which often demoralize the markets to the injury of producers, consumers, and the exchanges themselves." 1974 U.S. Code Congressional and Administrative News, p. 5844.

No portion of the federal act is intended to affect areas outside the scope of this statement of purpose. Thus, the federal preemption of regulation of this particular market does not also mean it preempts all state law that might apply to participants in the market. Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart Inc., 465 F. Supp. 585 (M.D. La., 1979).

Appellant cites two Minnesota cases, Owens-Illinois Glass Company v. Commissioner of Taxation, Dkt. No. 196 (Sept. 24, 1946); and State v. Northwestern States Portland Cement Co., 250 Minn. 32, 84 N.W. 2d 373 (1957), aff'd in 358 U.S. 450, 79

S. Ct. 357 (1959), as "solid legal precedent" that Appellant too should be held a business engaged exclusively in interstate commerce. However, both of those cases are readily distinguishable from the instant case.

In both Owens-Illinois and Portland Cement, the taxpayers were foreign corporations who had never qualified to do business within Minnesota. Appellant, on the other hand, is a domestic Minnesota corporation which, by reason of that fact, has always had and exercised the privilege of doing business within this state. In fact, from the date of its incorporation in 1928, until sometime in the 1960's, Appellant's sole offices were located in Minnesota.

But the most important distinguishing factor between these cases is that in both Owens-Illinois and Portland Cement the

question of whether the taxpayer involved was engaged exclusively in interstate commerce was obviously conceded for the sole purpose of being able to proceed unhindered with the more important constitutional issues raised in those cases. Undoubtedly, one reason for this concession by the Commissioner was the very practical difficulty of establishing an intrastate business when neither the Owens-Illinois Glass Co., nor Northwestern States Portland Cement had even qualified to do business in Minnesota.

Another reason, quite evident in the Portland Cement case, was that the Commissioner simply wanted to test the constitutional validity of Minn. Statute § 290.03, as it applied to foreign corporations. Obviously, the Commissioner could not do so if he sought to tax Northwestern States Co. under the excise tax provisions

of Minn. Statute 290.02. This circumstance was noted by Justice Whittaker in his dissent to the opinion of the U. S. Supreme Court in Portland Cement. In 358 U.S. at 483-484, 79 S. Ct. at 371-372, Justice Whittaker reviewed the evidence in the case and said:

> These recitals, if found true, might very well have supported a finding, had there been one, that the taxpayer was engaged in intrastate commerce in Minnesota. Particularly might the statement about the salesmen taking orders from builders, contractors and architects for local dealers have done so, for it was expressly held in Cheney Brothers Co. v. Commonwealth of Massachusetts, 246 U.S. 147, 155, 38 S. Ct. 295, 297, 62 L.Ed. 632, that such conduct amounted to engaging in the local business of selling products for such dealers. But no such finding was made by the Minnesota courts. And there is more than colorable basis for believing that Minnesota did not desire such a finding, as any such practice could easily be ended by Northwestern, and Minnesota's purpose was not to rest on such a basis but to obtain an adjudication that its statute, § 290.03, constitutionally imposed a tax upon the taxpayer's net income from Minnesota customers though derived "exclusively

(from) interstate commerce."

The above points make it perfectly clear that neither Owens-Illinois nor Portland Cement amount to the "solid legal precedent" for which Appellant argues. In neither case was the question of what constitutes "exclusively" interstate commerce, within the meaning of Minn. Statute § 290.03, actually litigated. It was simply conceded by all parties. Furthermore, the Commissioner's allegedly inconsistent position as between those two cases and the one at hand is readily explainable upon the basis of different facts and different legal issues involved. In summary, Owens-Illinois and Portland Cement are of no help to the Appellant herein.

Office - Supreme Court, U.S.
FILED
SEP 22 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-375

IN THE

Supreme Court of the United States

October Term, 1982

LOUIS N. RITTEN & CO.,

Petitioner,

vs.

THE COMMISSIONER OF REVENUE,
STATE OF MINNESOTA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under Minnesota law Petitioner, a Minnesota corporation engaged as a broker in the commodity futures business in Minneapolis, is subject to Minnesota's normal excise tax on corporate franchises imposed by Minn. Stat. § 290.02 (1971); or is subject to Minnesota's net income tax imposed only on corporations whose business "consists exclusively of . . . interstate commerce", within the meaning of Minn. Stat. § 290.03(1) (1971).

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, Commissioner of Revenue for the State of Minnesota, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case. That opinion is reported at 319 N.W.2d 421.

STATUTES INVOLVED

In its petition the Petitioner neglected to set forth the Minnesota statutes actually involved in this case, the interpretation of which have up to now constituted the sole issue in this litigation.

During the taxable years in issue, Minn. Stat. § 290.02, read as follows:

> 290.02 EXCISE TAX ON CORPORATIONS; IMPOSITION, MEASUREMENT. An annual excise tax is hereby imposed upon every domestic corporation, except those included within section 290.03, for the privilege of existing as a corporation during any part of its taxable year, and upon every foreign corporation, except those included within section 290.03, for the grant to it of the privilege of transacting or for the actual transaction by it of any local business within this state during any part of its taxable year, in corporate or organized form.
>
> The tax so imposed shall be measured by such corporations' taxable net income for the taxable year for which the tax is imposed, and computed in the manner and at the rates provided in this chapter.

During the taxable years in issue, Minn. Stat. § 290.03(1), read as follows:

> 290.03 INCOME TAX; IMPOSITION, CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:
>
> (1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state

or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party.

During the taxable years in issue Minn. Stat. § 290.08, subds. 1, 7, 8 and 13, read in relevant part as follows:

290.08 EXEMPTIONS FROM GROSS INCOME. Subdivision 1. In general. The following items shall not be included in gross income, . . .

* * * * *

Subd. 7. Interest from State or governmental subdivisions thereof. Interest upon obligations of the State of Minnesota, any of its political or governmental subdivisions, any of its municipalities, or any of its governmental agencies or instrumentalities;

Subd. 8. Interest from United States. Interest upon obligations of the United States, its possessions, its agencies, or its instrumentalities, so far as immune from state taxation under federal law; . . .

* * * * *

Subd. 13. Certain exemptions inapplicable to corporations. Subdivisions 4, 5, 10 and 11 shall not apply to corporations *and subdivisions 7 and 8 shall not apply to corporations taxable under section 290.02* or under section 290.361. (Emphasis added.)

STATEMENT OF THE CASE

This is a Minnesota state tax case which presents a question of purely state law, to wit: whether a domestic Minnesota corporation, which both the trial court and the Minnesota Supreme Court have found to be engaged in localized business activities, is nevertheless engaged in "*exclusively* . . . interstate commerce" (emphasis added) as that phrase is used in Minnesota's net income tax law, Minn. Stat. § 290.03(1).

If Petitioner's business consists of "exclusively . . . interstate commerce", its interest income from United States securities would be exempt from tax under Minn. Stat. § 290.08, subds. 8 and 13. But if it is not "exclusively . . . interstate commerce", then Petitioner is taxed under Minn. Stat. § 290.02 (the excise tax) and such interest is included in the measure of taxation.

Petitioner Louis N. Ritten & Co. (hereinafter "Ritten") is a domestic Minnesota corporation which has been engaged in business in the City of Minneapolis as a commodities futures broker since the 1920's. (A. 3).[1] During the years in question six or seven employees (corporate officers, brokers and staff) were maintained at Ritten's Minneapolis office. (*Id.*) A second office was opened in Chicago during the 1960's. (*Id.*) The facts concerning Ritten's business are essentially undisputed and were briefly described by the Minnesota Supreme Court as follows:

> Relator's futures trading involves the buying and selling of standardized contracts that specify a date and price at which a commodity will be delivered. The trading takes

[1] The abbreviation "A.——" is a reference to the Appendix contained in the Petition. The abbreviation "Pet. for Writ" refers to Ritten's Petition for Writ of Certiorari herein.

> place on the floor of an exchange, a competitive marketplace governed by rules promulgated by Congress and the federal Commodity Futures Trading Commission. A customer can have an order executed on the exchange floor by one of relator's brokers by first entering into a cash or credit transaction with relator. The credit transactions, or trades "on margin," involve depositing a downpayment with the broker, who uses the value of the futures contract as collateral for the unpaid balance. The unpaid balance or a portion thereof is subject to call by the broker in the event the commodity on the national market falls below a specified price.

(A. 3-4).

On its original Minnesota corporate tax returns for the years in issue, Ritten computed its tax under the terms of Minn. Stat. § 290.02, thereby including the interest earned from its United States securities in its Minnesota gross income. (A. 1). However, on March 17, 1976, Ritten filed claims for refund upon the basis that it should have been taxed under Minn. Stat. § 290.03, and that its interest income from United States securities should have therefore been tax exempt. (A. 2). The claims for refund were in the total amount of $15,958.26. (*Id.*)

After an administrative audit and review, including a conference with Ritten's representative, the Commissioner of Revenue found that Ritten maintained localized business activities within Minnesota, and therefore was not engaged "exclusively" in interstate commerce as required by Minn. Stat. § 290.03. The claims for refund were accordingly denied on October 2, 1979. (A. 2).

On November 30, 1979, Ritten took an appeal to the Minnesota Tax Court. Trial was held on May 14, 1980, and briefs were filed by both parties. On April 22, 1981, the Tax Court issued its Order completely affirming the Commissioner's denial of the refund claims. (A. 2).

On appeal to the Minnesota Supreme Court by writ of certiorari, Ritten continued to argue only that its business was engaged in "exclusively . . . interstate commerce" within the meaning of Minn. Stat. § 290.03(1).[3] However, the Minnesota Supreme Court upheld the Tax Court's findings of localized business activities, writing in its opinion that:

> As a representative of private persons, the broker provides access to the futures exchange, thus facilitating the flow of commodities in commerce without coming into contact with the commerce itself. This service is provided pursuant to a contractual agreement entered into when a customer walks into a broker's office. The agreement includes a commission charged for the service provided and, if the customer is trading on margin, it also establishes a credit arrangement at an agreed upon interest rate. In view of these localized activities, we cannot characterize relator's business within this state as consisting *exclusively* of interstate commerce. (Emphasis added.)

(A. 12).

The Minnesota Supreme Court thereupon affirmed the decision of the Minnesota Tax Court.

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[3] Ritten raised no argument concerning the applicability of 31 U.S.C. § 742; nor did it mention or cite the three provisions of the United States Constitution now appearing for the first time in its Petition for Writ. *See* Pet. for Writ at 1, 2-3.

REASONS FOR DENYING THE WRIT

I. THE FIRST QUESTION PRESENTED IN THE PETITION (CONCERNING 31 U.S.C. § 742) WAS NEITHER RAISED NOR DECIDED BELOW.

Petitioner Ritten asserts that the first Question Presented in this case is:

> "Whether Minnesota's income tax on interest income from U.S. government obligations violates 31 U.S.C. 742 and, therefore, the supremacy and borrowing clauses of the federal constitution."

However, this Question was neither raised nor decided in either of the state courts below. Certainly the basic pleading in this case, consisting of Ritten's Notice of Appeal to the Minnesota Tax Court, never mentioned the issue.[8] Moreover,

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[8] The allegations in Ritten's Notice of Appeal read as follows:

Under Minnesota law, every domestic corporation, except those included within Section 290.03 of the Minnesota Income & Excise Tax Act (Minn. Stat. Ann. 1976, ch. 290, sec. 290.03) is subject to an annual excise tax which taxes, among other things, interest from U. S. government obligations. (See, section 290.02 and section 290.08, subds. 8 and 13). Domestic corporations which own property within the state and whose business consists exclusively of interstate commerce are subject to an annual net income tax (section 290.03). However, these corporations are exempt from tax on interest earned on U. S. government obligations. (See, section 290.08, subds. 8 and 13). Louis N. Ritten & Co., Inc., a Minnesota corporation taxpayer, is a commodity futures brokerage house, and it contends that its business operations consist exclusively of interstate commerce, and not localized business activities. It argues that it is a domestic corporation subject to the tax provisions of section 290.03, and not section 290.02 because its operations consist exclusively of interstate commerce. Taxpayer concludes that under the annual net income tax of section 290.03 and section 290.08, its interest on U. S. government obligations is exempt from tax, and that its claims for refunds in the amount of $15,956.26 for calendar years 1972, 1973 and 1974 should have been granted.

none of Ritten's briefs or other papers filed below even cited either 31 U.S.C. § 742, or the supremacy and borrowing clauses of the United States Constitution.

A clear requirement of jurisdiction being granted under 28 U.S.C. § 1257(3), is that the validity of a state statute must have been "drawn in question" as part of the proceedings below; or that a federal title, right, privilege or immunity must have been "specially set up or claimed" as part of the proceedings below. Since Ritten failed to accomplish either of these acts with respect to its first Question Presented, there exists no ground for the granting of certiorari.

Ritten must recognize this weakness in its position because it goes on to make the claim that the Question was nevertheless "decided" by the Minnesota Supreme Court in footnote 1 of its opinion. Pet. for Writ, at 5. Of course, the Minnesota Supreme Court did no such thing. Footnote 1 of the opinion below was devoted totally to background information which was not necessary to the decision in the case. The sole reference to 31 U.S.C. § 742 in that footnote was as follows:

> The inclusion of interest on United States government obligations in computing the franchise tax, but not the income tax, is the product of federal legislation which prohibits taxation of such interest except under "nondiscriminatory franchise or other nonproperty taxes in lieu thereof imposed on corporations and except estate taxes or inheritance taxes." 31 U.S.C. § 742 (1976); *see Reuben L. Anderson-Cherne, Inc. v. Comm'r of Taxation*, 303 Minn. 124, 226 N.W.2d 611, *appeal dismissed*, 423 U.S. 886 (1975).

(A. 6-7).

This statement had nothing to do with the real grounds for the judgment below, which rested entirely upon the Minnesota Supreme Court's determination that Ritten was not engaged in "exclusively . . . interstate commerce" within the meaning of Minn. Stat. § 290.03(1). Therefore, any review by this Court of the accuracy or inaccuracy of the statement made in footnote 1 of the Minnesota Supreme Court's opinion below could only be accomplished by an advisory opinion, which this Court is of course not empowered to render. *See Herb v. Pitcairn*, 324 U.S. 117, 126 (1945).

Finally, it must be noted that Ritten's first Question Presented has essentially already been decided. In *Reuben L. Anderson-Cherne, Inc. v. Minnesota Commissioner of Taxation*, 303 Minn. 124, 226 N.W.2d 611 (1975), *appeal dismissed*, 423 U.S. 886 (1975), the Minnesota Supreme Court expressly held that Minnesota's excise tax imposed by Minn. Stat. § 290.02, is:

> [I]n fact, *a franchise tax imposed upon the privilege of operating as a corporation.* The inclusion of interest on Federal securities in determining net income of the corporation is used *only as a measuring stick to compute the amount of a franchise tax due* under Minn. St. 1971, § 290.02. As such, it is permissible under 31 USCA, § 742. (Emphasis added.)

303 Minn. at 130, 226 N.W.2d at 615.

The subsequent appeal in that case to this Court was dismissed for want of a substantial federal question. 423 U.S. 886 (1975).

Respondent is not familiar with the state laws involved in the three cases which Ritten states have been granted review

by this Court during the 1981 Term. Pet. for Writ, p. 6.[4] But whatever their merits, it is clear that Minnesota's law, at least, has already met the test of validity under 31 U.S.C. § 742. In any event, if Ritten had wanted the question to be reviewed again it should have properly raised the issue below.

II. THE REMAINING ISSUE (CONCERNING THE MEANING OF THE STATUTORY PHRASE "EXCLUSIVELY . . . INTERSTATE COMMERCE") IS PURELY A QUESTION OF STATE LAW AND THUS FAILS TO PRESENT A SUBSTANTIAL FEDERAL QUESTION.

In this lawsuit Ritten has simply failed to present a question of federal law. Although it now claims to have raised a commerce clause issue (Pet. for Writ, p. 5), Ritten's actual pleadings and subsequent arguments below never once averred that Minnesota's statutory system of taxation was in violation of the commerce clause. *See e.g.*, footnote 3, *supra*.

In fact, Ritten based its claim for refund entirely upon a reading of Minnesota statutory law. *Id.* That is the basis upon which this case was tried, and correctly so, for it is solely the Minnesota legislature's use of the phrase "*exclusively* . . . interstate commerce" (emphasis added) in Minn. Stat. § 290.-03(1), which is at issue herein.

The Minnesota Supreme Court, in its opinion below, noted that decisions of this Court are relevant and binding on the question of what is interstate commerce (A. 8); but it also correctly reserved to itself the job of interpreting what the Min-

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[4] These are: (1) No. 81-1613, *Memphis Bank & Trust Co. v. Garner*; (2) No. 81-1717, *American Bank and Trust Co. v. Dallas County*, and (3) No. 81-1834, *Bartow County Bank v. Bartow County Board of Trustees*.

nesota legislature meant when it used the key word "exclusively" in conjunction with the term "interstate commerce". That is purely a question of state law, upon which the Minnesota Supreme Court has the last word. Since Ritten chose to prosecute its appeal on the basis of Minnesota's statutory law, rather than upon any constitutional ground, it is now bound by the Minnesota Supreme Court's opinion.[5]

Ritten's further contention that the decision below has misinterpreted some of this Court's opinions (Pet. for Writ, p. 10) is undoubtedly a reference to the case of *Ozark Pipe Line Corporation v. Monier*, 266 U.S. 555 (1925). However, *Ozark Pipe Line* does not apply at all to this case, and the Minnesota Supreme Court had little difficulty in distinguishing it upon its unique facts. (A. 14-16). *Compare Ward & Leland v. Mobile County*, 209 U.S. 405 (1908) (upholding a state license tax on the cotton futures trading business because the service provided by a futures broker was local in nature and not interstate commerce for purposes of state taxation). Furthermore, *Ozark Pipe Line* did not involve the interpretation of statutory language at all. Therefore, that case has no bearing upon the present case, where the sole issue is the correct interpretation of a statutory phrase used in one of Minnesota's state laws. Because this is strictly a matter of state law, it follows that no substantial federal question exists for this Court to review.

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[5] Even if it were conceded *arguendo* that a federal question was raised in this case, it is clear that the Minnesota Supreme Court's judgment would in any event stand upon an adequate and independent nonfederal ground, to wit: its construction of the Minnesota legislature's intent in using the word "exclusively" in Minn. Stat. § 290.03(1). Thus, review would still be impermissible. *Herb v. Pitcairn*, 324 U.S. 117, 125-126 (1945).

CONCLUSION

For these reasons, the petition for a writ of certiorari herein should be denied.

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